

SOUTH AFRICA / JUDGMENT

AMCU obo Mtya v Commission for Conciliation Mediation and Arbitration and Others

(JR736/22) [2024] ZALCJHB 301 (12 August 2024)

[2024] ZALCJHB 301

COURT

Labour Court Johannesburg

BEFORE

N Tshisevhe

CASE / FILE NUMBER

JR736/22

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

THE LABOUR COURT OF
SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case

no: JR736/22

In

the matter between:

AMCU
OBO NKOSIYABO MTYA
Applicant
and
COMMISSION
FOR CONCILIATION, MEDIATION
AND
ARBITRATION
First
Respondent
COMMISSIONER
DANIEL MAJARE, N.O.
Second
Respondent
SIBANYE
STILLWATER DRIEFONTEIN
Third
Respondent

Heard:

25 June
2024

Delivered:12 August 2024

JUDGMENT

TSHISEVHE, AJ

Introduction

- [1] Before me is an application for review in terms of Section 145(1)(a) of the Labour Relations Act[1] (The LRA).
- [2] This is an application to review and set aside the arbitration award made under case number GAJB16839-19 dated 10 March 2022 in terms of which the dismissal of the applicant was found by the Second Respondent to have been substantively fair.
- [3] The Third Respondent (Sibanye Stillwater) opposed the application.

Material background facts

- [4] The Applicant (Nkosiyo Mtya) was employed by the Third Respondent as a Rock Drill Operator from 21 June 2004 earning an amount of R13 932 per month.
- [5] Following a deadlock on salary increase negotiations, on 21 November 2018, AMCU embarked on a protected strike action which lasted for a period of around five (5) months. On the other hand, the National Union of Mine Workers (NUM) was not participating in the strike.
- [6] On 22 November 2018, the Third Respondent was granted an interdict by this Honourable Court, interdicting NUM, AMCU and non-union members from inter alia, intimidating non-striking workers, service providers, suppliers and customers.
- [7] On 21 February 2019, Mr Simanga Ngwenya (Mr Ngwenya) an employee of the Third Respondent and NUM member, who was not on strike at the time of the strike, reported to Sibanye Gold Protection Services that he was threatened by the Applicant at the local shopping complex.
- [8] As a result, an investigator, Mr Paulus Thlaripe was assigned to investigate the case.
- [9] On or about 21 June 2019, the Applicant was summoned to appear before a disciplinary enquiry to answer to the allegations relating to threatening Mr Ngwenya. The charge was as follows:

‘gross misconduct in that on or about 21 February 2019 in Carletonville, you intimidated and threatened an employee reporting for work by saying you know the game they playing with you; you will play the same game against them.’

- [10] The Applicant was found guilty as charged and a sanction of dismissal was meted out.

- [11] Aggrieved by the dismissal, the Applicant through his union (AMCU) referred an unfair dismissal dispute to the CCMA with the Second Respondent as an arbitrator, challenging substantive fairness.
- [12] The Second Respondent found the dismissal of the Applicant to have been substantively fair thereby dismissing the application.
- [13] The Applicant then launched a review application challenging the decision of the Second Respondent.

The arbitration award

- [14] The Second Respondent in his arbitration award has set out the evidence adduced by the witnesses. In his analysis of the evidence and arguments, the arbitrator identified the issue to be decided as to whether the Applicant's dismissal was substantively fair as procedural fairness was not in dispute.
- [15] The Applicant was dismissed for threatening a colleague viz. Mr Simanga Ngwenya as outlined in paragraph 9 above.
- [16] The Second Respondent rejected the Applicant's version that he never threatened Mr Ngwenya.
- [17] The second Respondent during the arbitration hearing further heard evidence that both the Applicant and Mr Ngwenya were members of AMCU and NUM respectively. Most importantly, both of them were not on strike.
- [18] The Second Respondent further heard evidence that Mr Ngwenya received threatening calls from unknown numbers.
- [19] The Second Respondent in his analysis of evidence stated that for a member of AMCU to tell him that "they will play the game that he was playing" was not only contravention of the Respondent's policy, but also the Court order.
- [20] The Second Respondent further found that such misconduct constituted a serious threat under the circumstances where employees were killed, stabbed and houses burnt.
- [21] The Second Respondent found the Applicant's dismissal substantively fair.

Grounds for review

- [22] The Applicant raised several grounds of review, amongst others that, the Second Respondent committed misconduct in that he never intimidated Mr Ngwenya. He further argued that, even if he may for argument's sake accept that he uttered those words, the said words are neither threatening nor intimidating.
- [23] The Second Respondent failed to consider the fact that the dispute occurred outside the work premises on a Sunday and had nothing to do with the strike action.

- [24] That Second Respondent failed to assess the probabilities of the Applicant and Mr Ngwenya's versions. The Applicant submitted that he was owed an amount of R1500 by Mr Ngwenya and on the other hand, Mr Ngwenya denied ever borrowing money from the Applicant.
- [25] The Third Respondent submitted that they had to transfer Mr Ngwenya to a different workstation as a result of the threats he was also getting from anonymous calls.
- [26] The Third Respondent further submitted that there was a Court order which prohibited both unions from intimidating or threatening non-striking workers.

Test for Review

- [27] The test that the Labour Court is required to apply in a review of an arbitrator's award is, "is the decision reached by the commissioner one that a reasonable decision-maker could not reach within the totality of evidence at his disposal?"
- [28] The Constitutional Court settled the issue of test for review of an arbitration award in the case of *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*.^[2] The Court at para 110 held that the test for review is whether the decision reached by the Commissioner is one that a reasonable

decision maker could not reach in relation to the evidence before him or her.^[3]

- [29] The test to be applied is one that recognises and reinforces the distinction between a review and an appeal. This Court is entitled to intervene if and only if the arbitrator's decision is one that falls outside of a band of decisions to which a reasonable decision-maker could come to on the available material evidence before him.
- [30] As the Court rightly pointed out in the *National Commissioner of the South African Police Service v Myers and Others*,^[4]

'whatever one's personal view may be, the test as set out in *Sidumo*... is whether or not the arbitrator's decision that dismissal is an appropriate sanction is a decision that a reasonable decision-maker could reach.'

- [31] The critical approach to reviews that turn on 'unreasonableness' was articulated by Murphy AJA in *Head of the Department of Education v Mofokeng and Others*^[5] at paragraphs 30 to 33. The significant passages are emphasized:

'[30] The failure by an arbitrator to apply his or her mind to issues which are material to the determination of a case will usually be an irregularity. However, the Supreme Court of Appeal ("the SCA") in *Herholdt v Nedbank Ltd*^[6] and this court in *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA and others*^[7] have held that before such an irregularity will result in the setting aside of the award, it must, in addition, reveal a misconception of the true enquiry or result in an unreasonable outcome.

- [31] The determination of whether a decision is unreasonable in its result is an exercise inherently dependent on variable considerations and circumstantial factors. A finding of unreasonableness usually implies that some other ground is present, either latently or comprising manifest unlawfulness. Accordingly, the process of judicial review on grounds of unreasonableness often entails examination of inter-related questions of rationality, lawfulness and proportionality, pertaining to the purpose, basis, reasoning or effect of the decision, corresponding to the scrutiny envisioned in the distinctive review grounds developed casuistically at common law, now codified and mostly specified in section 6 of the Promotion of Administrative Justice Act (“PAJA”); such as failing to apply the mind, taking into account irrelevant considerations, ignoring relevant considerations, acting for an ulterior purpose, in bad faith, arbitrarily or capriciously, etc. The court must nonetheless still consider whether, apart from the flawed reasons of or any irregularity by the arbitrator, the result could be reasonably reached in the light of the issues and the evidence. Moreover, judges of the Labour Court should keep in mind that it is not only the reasonableness of the outcome which is subject to scrutiny. As the SCA held in *Herholdt*, the arbitrator must not misconceive the inquiry or undertake the inquiry in a misconceived manner. There must be a fair trial of the issues.
- [32] However, sight may not be lost of the intention of the legislature to restrict the scope of review when it enacted section 145 of the LRA, confining review to “defects” as defined in section 145(2) being misconduct, gross irregularity, exceeding powers and improperly obtaining the award. Review is not permissible on the same grounds that apply under PAJA. Mere errors of fact or law may not be enough to vitiate the award. Something more is required. To repeat: flaws in the reasoning of the arbitrator, evidenced in the failure to apply the mind, reliance on irrelevant considerations or the ignoring of material factors etc must be assessed with the purpose of establishing whether the arbitrator has undertaken the wrong enquiry, undertaken the enquiry in the wrong manner or arrived at an unreasonable result. Lapses in lawfulness, latent or patent irregularities and instances of dialectical unreasonableness should be of such an order (singularly or cumulatively) as to result in a misconceived enquiry or a decision which no reasonable decision maker could reach on all the material that was before him or her.
- [33] Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the inquiry. In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator's conception of the inquiry, the delimitation of the issues to be determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will *ex hypothesi* be material to the determination of the general nature of the decision in issue; the range of relevant factors informing the decision; the nature of the competing interests impacted upon by the decision; and then ask whether a reasonable equilibrium has been struck in accordance with the objects of the LRA. Provided

the right question was asked and answered by the arbitrator, a wrong answer will not necessarily be unreasonable. By the same token, an irregularity or error material to the determination of the dispute may constitute a misconception of the nature of the enquiry so as to lead to no fair trial of the issues, with the result that the award may be set aside on that ground alone. The arbitrator however must be shown to have diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination.'

- [32] Astonishingly, in the present matter, the Applicant was dismissed after being found guilty of threatening a colleague who was not on a strike action just like him.
- [33] The Third Respondent argued that the Applicant committed misconduct in that he informed his colleague Mr Ngwenya, a NUM member, who was asked if he was not on strike and he indicated that he was not on strike but working.
- [34] It is only then that the Applicant is alleged to have said that "I know the game that you are playing; I will play the same game against you", the statement vehemently impugned by the Applicant.
- [35] The Second Respondent found that the above words were meant to threaten Mr Ngwenya because the Applicant is a member of AMCU. Further several workers were killed in the past as a result of violence during strike action.
- [36] During the hearing of this review application, I tried at length to solicit an explanation from the Third Respondent's legal representative on the meaning of the above words in paragraph 9, with no success.
- [37] In the case of *Telcordia Technologies Inc v Telkom SA Ltd*, [8] the Supreme Court of Appeal (SCA) held that:

'an irregularity or error material to the determination of the dispute may constitute a misconception of the nature of the enquiry so as to lead to no fair trial of the issues, with the result that the award may be set aside on that ground alone. The arbitrator however must be shown to have diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination.'

- [38] It is therefore apparent from the above judgments that there must be a nexus between the error and the fairness of the trial which should be proven by the Applicant in an application for review failing which the review application stands to fail.
- [39] It is trite that in unfair dismissal disputes the first task of the arbitrator is to determine whether the employee was guilty of

the offence he or she is alleged to have committed. If it is found that indeed the employee was guilty as charged the next task of the arbitrator is to enquire into the fairness of the sanction imposed by the employer.

- [40] The onus to show that the employee was guilty of the offence and that the dismissal was fair rests with the employer.
- [41] It is therefore trite that when determining whether the result of an arbitrator's award is unreasonable, I must broadly evaluate the merits of the dispute and consider whether, if the arbitrator's reasoning is found to be unreasonable, the result is nevertheless capable of justification for reasons other than those given by the arbitrator in his award.
- [42] The result will, however, be unreasonable if it is entirely disconnected from the evidence, unsupported by any evidence and involves speculation by the arbitrator. An award will no doubt be considered to be reasonable when there is a material connection between the evidence and the result or, put differently when the result is reasonably supported by some evidence. Unreasonableness is, thus, the threshold for interference with an arbitrator's award on review.
- [43] It is important to indicate that after a cursory glance at the award of the Second Respondent, I could not find anything that justified the dismissal of the Applicant, most importantly considering the meaning of the words the Applicant is alleged to have uttered, which the Second Respondent found to be constituting a threat.
- [44] When interpreting the so-called threatening words, I also considered the fact that both the Applicant and Mr Ngwenya were not on strike at the time.
- [45] According to me, it would only make sense if the Applicant came to a conclusion that since Mr Ngwenya was not supporting the strike initiated by his trade union (AMCU), the Applicant decided to threaten him. Moreover, according to me, they all seemed to have been "playing the same game" that the Second Respondent found to be a threat because they were all not on strike.
- [46] It is flabbergasting that the Applicant could blame someone (threaten) for not supporting the strike action initiated by his trade union AMCU, whereas he was also not supporting same as he was working during the strike action.
- [47] It is therefore unfathomable that the meaning of what is alleged to have been said by the Applicant constitutes a threat under the circumstances.
- [48] It seems to me that the two parties were talking about something different other than the strike action that was on at the time.
- [49] I am left with no choice but to accept the Applicant's version that he never threatened Mr Ngwenya. The decision of the arbitrator is outside the band of reasonableness and it is not one that a reasonable decision maker could arrive at within the totality of the evidence before him.

- [50] I make the above finding without even trying to look for a reason for doing so because the words that are alleged to have been uttered by the Applicant fall short of constituting a threat.
- [51] While I accept the fact that workers get killed during strike actions. There must be evidence that links a dismissed employee to the alleged misconduct. As a result, it will be an unreasonable decision to dismiss an employee whose action does not constitute any dismissible conduct. There must be a nexus between the misconduct and the dismissed employee.
- [52] Mr Ngwenya on the other hand averred that after the incident, he had been inundated with threatening calls from unknown numbers. My concern is that, nothing was said or raised about what those callers said, let alone to disclose those numbers for investigation purposes. The said calls were never linked to the Applicant.
- [53] It behoves me to state that the Second Respondent ought to have gone further in assessing the nature of the calls as well as investigating to see if they are linked to the Applicant.
- [54] The Second Respondent accepted as evidence that Mr Ngwenya received threatening calls without trying to establish if ever those calls were actually made and were linked to the Applicant.

Conclusion

- [55] Having considered the evidence adduced at the arbitration proceedings, the findings made by the arbitrator and the grounds for review as raised by the Applicant, I find that the arbitrator failed to apply his mind to the evidence or ignored material facts or evidence or that he failed to weigh up the probabilities that presented themselves in the versions before him.
- [56] Succinctly put, I am left with no choice, but to interfere with the decision of the arbitrator, as it falls outside the band of reasonableness.

Costs

- [57] I have had regard to the requirements of law and fairness in considering costs and having done so, I am of the view that a cost order is not warranted in this matter.
- [58] In the premises, I make the following

orders:

Order

1. The application for review is upheld.
2. The dismissal of the Applicant was substantively unfair.

3. The award of the Second Respondent is reviewed and set aside.
4. The Third Respondent is hereby ordered to retrospectively reinstate the Applicant.
5. No order is made as to costs.

N Tshisevhe

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant: Adv. A.L Cook Instructed by: LDA Attorneys For the Respondent: Jayson Kent
Instructed by: Solomon Holmes Attorney

[1] Act 66 of 1995, as amended.

[2] 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 (CC) at para 110.

[3] In CUSA v Tao Ying Metal Industries and others [2009] 1 BLLR 1 (CC); [2008] ZACC 15 at paras 76 and 134 the Constitutional Court held that it is now axiomatic that a commissioner of the CCMA (or an arbitrator of a bargaining council) is required to apply his or her mind to the issues before him or her and that failure to do so may result in the ensuing award being reviewed and set aside. The irregularity must however result in an unreasonable outcome or misconception of the true enquiry resulting in no fair trial of the issues. See also Sidumo and Another v Rustenburg Platinum Mines Ltd 2008

(2) SA 24 (CC).

[4] (Myers)

[2012] ZALAC 4; [2012] ZALAC 4 at paras 103-104.

[5] [2014] ZALAC 50; [2015] 1 BLLR 50 (LAC).

[6] (2013) 34 ILJ 2795 (SCA); 2013 (6) SA 224 (SCA).

[7]

[2014] 1 BLLR 20 (LAC); [2013] ZALAC 28.

[8]

[2006] ZASCA 112; 2007

(3) SA 266 SCA[2006] ZASCA 112; ; [2007] 2 All SA 243 (SCA) at paras 52-78 and 85-88.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZALCJHB/2024/301.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/amcu-obo-mtya-v-commission-for-conciliation-mediation-and-arbitration-and-others-unknown-topic-alcjhb-2024>

Prepared on 14 October 2026 · Esheria